

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID B. PACK

Claimant

VS.

SUPERIOR TOYOTA

Respondent

AND

CHUBB GROUP OF INSURANCE COS.

Insurance Carrier

Docket No. 1,009,798

ORDER

Respondent requests review of the February 2, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Robert Foerschler.

ISSUES

The ALJ issued a preliminary hearing Order on February 2, 2004, which provided in part, as follows:

For the time being this claim will be considered compensable and referral to physical therapy and possibly pain management should be provided by respondent. However, if the Claimant's smoking problem is not improved, suspension of benefits may be considered.¹

The ALJ reasoned that, based upon the medical records and an independent medical examiner's report, claimant's ongoing back complaints and his present need for conservative treatment were attributable in part to his work. Under the rationale set forth

¹ ALJ Order (Feb 2, 2004) at 2.

in *DeMars*² and *Harris*,³ the ALJ concluded claimant was therefore entitled to medical treatment.

The respondent requests review of this decision alleging claimant failed to prove his current need for medical treatment was caused by an accidental injury that arose out of and in the course of his employment with respondent. Specifically, respondent argues that claimant's ongoing back complaints were caused by the natural aging process and predated the alleged period of microtraumas.

Claimant argues the evidence supports his claim for medical treatment as well as temporary total disability benefits. Although claimant admits he has experienced ongoing back problems over the years, he maintains his work activities as a reconditioning mechanic for respondent from May 2002 to March 5, 2003, aggravated and accelerated the degenerative condition in his spine and low back. Not only does claimant believe the ALJ's preliminary hearing Order should be affirmed, claimant maintains the evidence substantiates his claim for temporary total disability benefits commencing July 2, 2003, the date he filed his E-3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board (Board) makes the following findings of fact and conclusions of law:

Claimant has worked for respondent as a mechanic since 1977. For most of that time he was a line mechanic, but in the last few years he has focused on used car reconditioning. This job required him to repair and replace components on used cars in preparation for selling them. He would have to bend over the engine compartment frequently during the day as well as lift and replace tires, wheels and sometimes transmissions and axles.

Claimant began experiencing some back pain in January or February 2001.⁴ He had a back injury in 1990 followed by surgery which left him with intermittent pain throughout the 90's. But claimant was able to perform his regular work duties. In 2001, when claimant noticed his back complaints were increasing he did not advise his employer. Claimant indicated he thought this pain would go away. When asked why he didn't inform his employer, he testified "I just--you know, you've got a day where you've got to lift a

² *DeMars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁴ P.H. Trans. at 12.

bunch of stuff and you go home and your back hurts a little bit.”⁵ Claimant sought treatment from his primary care physician, Dr. Ralph Mingle. According to claimant, he was given pain medication and continued working.

In June or July 2002, claimant began working longer hours as another co-worker was off work. He was working 50-60 hours per week. Claimant testified that this caused his back to be more sore and stiff. Claimant also testified that he continued to see Dr. Mingle and began taking more pain medication to alleviate his increasing pain complaints.⁶ This fact is borne out by the medical records. Claimant continued to work until March 5, 2003. Then, on March 6, 2003, he called in sick. Claimant did not advise respondent he was taking time off due to a back injury. He merely told them he was taking a sick day.⁷

Claimant did the same thing on the next day, advising respondent he had an appointment with a specialist, Dr. Nicholas Ahn, on the following Monday. Again, there was no mention of an injury or a relationship to his work activities.

Dr. Ahn examined claimant and diagnosed multilevel spinal stenosis and degenerative disc disease, most severe at the L2-3 level. Claimant was taken off work indefinitely and surgery was recommended. At this point, claimant advised respondent that he was unable to work. Claimant testified that he provided Scott Bailey and Mike McKinley, whose positions are unclear from the record, with his paperwork. Unfortunately, the off work release is not included in the record. In any event, claimant has not worked since March 5, 2003.

Dr. Mingle, claimant’s primary care physician, diagnosed multi-level central stenosis at the L4-5 level which was described as “moderate to moderately high grade”.⁸ He indicated “the work that he [claimant] does there may very well be a contributing factor to his problems.”⁹ In that same report, Dr. Mingle acknowledges the other contributing factors to claimant’s degenerative condition, including a history of required steroid use and rheumatoid arthritis. Nonetheless, Dr. Mingle found a “clear correlation with increased pain that appears to be associated with his on-the-job duties.”¹⁰

⁵ Id. at 13.

⁶ Id. at 14.

⁷ Id. at 15.

⁸ Id., Ex. 2

⁹ Id.

¹⁰ Id.

Dr. Ahn was asked about the causative aspects of claimant's present back complaints and opined that he had "no doubt that Mr. Pack's occupation as an auto mechanic did contribute to his degenerative changes in his lumbar spine."¹¹

When respondent was not forthcoming with treatment and temporary total disability benefits, claimant initiated a preliminary hearing. On August 28, 2003, the preliminary hearing was held and at the conclusion of claimant's testimony, the ALJ appointed Dr. Mark Bernhardt to perform an independent medical examination for purposes of determining the cause of claimant's present complaints, the connection to claimant's work and suggested course of treatment.¹²

Dr. Bernhardt examined claimant on November 18, 2003. He diagnosed degenerative disc disease at multiple levels, developmentally shallow lumbar spinal canal with lumbar spinal stenosis, chronic low back pain and left leg radiculopathy.¹³ In response to the ALJ's request on the issue of causation, he indicated "that work activities have contributed to the development of his symptoms, but certainly are not solely responsible for such."¹⁴

Respondent argues that claimant's need for treatment bears no causal relationship to his work activities. After reviewing the record as presently developed and the briefs of the parties, the Board finds no reason to disturb the ALJ's findings. Although claimant had a preexisting disease process at work in his spine, it is clear from claimant's testimony as well as the medical records, that claimant's physical condition deteriorated over the weeks and months before March 2003. This coincides with his increased work duties. The fact that claimant had a preexisting condition does not preclude him from asserting a workers compensation claim. If there is a subsequent compensable injury that aggravates, accelerates or intensifies the preexisting condition, there is liability under the Kansas Workers Compensation Act.¹⁵ Each of the three physicians who have seen claimant have suggested that claimant's work activities played at least some part in his present condition and the resulting physical complaints. Accordingly, the preliminary hearing Order should be affirmed.

¹¹ Id., Ex. 1

¹² Id. at 38.

¹³ Dr. Bernhardt's report at 3.

¹⁴ Id. at 3.

¹⁵ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

As for the claimant's request to award temporary total disability benefits, the Board finds it has no jurisdiction to address that issue.¹⁶

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Robert Foerschler dated February 2, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2004.

BOARD MEMBER

c: Neil Foth, Attorney for Claimant
Jeff S. Bloskey, Attorney for Respondent and its Insurance Carrier
Robert Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹⁶ K.S.A. 44-534a(a)(2)(Furse 2000).